

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of
EDYTHE (AVA) KUPCHICK and

AVA REALTY, INC., AFFILIATE,

Respondents

HUDALJ No. 88-1277-DB

Leo C. DiEgidio, Esquire
For the Respondents

Ronnie Ann Wainwright, Esquire
For the Department

Before: Alan W. Heifetz
Chief Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

This proceeding arose as a result of a proposal by the Department of Housing and Urban Development ("the Department" or "HUD") dated October 7, 1988, to debar Edythe (Ava) Kupchick and her affiliate, Ava Realty, from further participation in HUD programs for a period of (3) years from that date.¹ The Department's actions are based upon Respondent Kupchick's conviction in the United States District Court for the Northern District of Ohio, Eastern Division, for violating 18 U.S.C. Secs. 1012 and 2. Respondents had been previously suspended on June 16, 1988, from further participation in HUD programs pending final action after the issuance of a criminal Information on November 12, 1987.

¹ The October 7, 1988, letter supercedes a debarment and suspension letter dated June 16, 1988. On October 24, 1988, I issued an order granting the Department's motion to permit its original complaint of August 25, 1988 also to be superceded by this letter.

Respondents requested a hearing on the proposed debarment in an undated letter submitted after issuance of the initial debarment proposal and again on October 18, 1988. Because the proposed action is based upon a conviction, the hearing was limited under Department Regulation 24 C.F.R. Sec. 24.13 (a) (3) to submission of documentary evidence and briefs. This matter being ripe for decision, I now make the following findings and conclusions based upon the record submissions:

Findings and Conclusions

Respondent Kupchick owned and operated a real estate brokerage business in Cleveland, Ohio, doing business as Ava Realty.

On June 30, 1988, Respondent was convicted in accordance with her plea of guilty in the U.S. District Court for the Northern District of Ohio, Eastern Division, of ". . . knowingly and willfully, and with intent to defraud, cause(ing) false statements concerning the names of Kathy Parker and James Parker to the Department of Housing and Urban Development on an application of the Parkers for Federal Housing Authority loan insurance in violation of Title 18, Section 1012 and 2, United States Code as charged in the Information (misdemeanor)." The Information was dated November 12, 1987.

Respondent was given a suspended sentence and placed on probation for two years. In addition she was fined the sum of one-thousand dollars to be paid within the first ninety days of probation and, "as a result of the admitted criminal act of the defendant", ordered to make restitution to HUD in the amount of fifteen thousand dollars within the first year of the probation period.

Respondent Kupchick had previously been issued a Temporary Denial of Participation ("TDP") in accordance with 24 C.F.R. Sec. 24.18 on November 26, 1986. This was withdrawn on December 31, 1986, after an informal hearing. Based on the filing of the Information against her, Respondent was issued a notice of a proposed three year debarment and was suspended on June 16, 1988. As noted above, this notice was superceded by a second proposed three year debarment and suspension, dated October 7, 1988, which was based on the conviction.

The Information upon which Respondent Kupchick was convicted charges that from about April 12, 1984, to about June 15, 1984, she knowingly, willfully and with intent to defraud HUD made false representations as to the names of proposed mortgagors. The false names were used in applications to procure single family mortgage insurance available only to certain qualified individuals.

The Department relies upon the cause stated in 24 C.F.R. Sec. 24.6 (a) (2). This regulation provides for debarment upon conviction of a crime involving a lack of business integrity or honesty which affects the present responsibility of a "participant" including the making of false statements and/or falsification. HUD also argues that a three year debarment is necessary to protect the public interest and to deter misconduct by other participants in HUD programs.

Respondent asserts that she is innocent of the charge for which she stands convicted. She states that she pleaded guilty to a misdemeanor to avoid the rigors of a trial² and to avoid telling her husband who is suffering from cancer. She also claims that she had no knowledge of the fraud, and that she had no obligation beyond bringing the parties together. She argues that her obligation to the parties did not extend to the financing of the sale.³ She also contends that the debarring official is bound by the determination to cancel the Temporary Denial of Participation under the doctrine of res judicata. Finally, she points out that she is the sole support of her family, and depends on the FHA program for her livelihood. She claims that even though she had to make restitution, the Parkers did not.

Respondents do not dispute that they are "participants" as defined in 24 C.F.R. Sec. 24.4 (u). Debarment is a sanction which may be invoked by HUD as a measure for protecting the public by ensuring that only those qualified as "responsible" are allowed to participate in HUD programs. 24 C.F.R. Sec. 24.1; Stanko Packing Co. v. Bergland, 489 F.Supp. 947, 949 (D.D.C. 1980); Roemer v. Hoffman, 419 F.Supp. 130, 131 (D.D.C. 1976). "Responsibility" is a term of art used in government contract law. It encompasses the projected business risk of a person doing business with HUD. This includes integrity, honesty, and ability to perform. The primary test for debarment is present responsibility although a finding of present lack of responsibility can be based upon past acts. Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957); Roemer, supra. It is clear that

² Respondent is 76 years of age.

³ Respondent states the following in her Answer to the original complaint: "Respondent, Ava Realty, is a licensed real estate agent in the State of Ohio and as such had an obligation to the buyers and the sellers to bring them together in a 'meeting of the minds'. Respondent sold the within-mentioned properties by procuring buyers and sellers agreements at specific terms and prices. Respondent had no further obligation as a result of her employment contract than to sell the real estate. Under no circumstances did Respondent have either the obligation nor (sic) the ability to finance the purchasers' loans. Respondent was not in any way specifically involved with any alleged falsification of documents, forgeries, false names, false income or occupational status, nor (sic) the handling of any forms to be completed verifying wages or income or deposits." (Respondent's Answer, pp. 4-5)

Respondents evidence a clear lack of present responsibility based upon a conviction for falsifying the names of prospective purchasers in order to sell property insured by FHA. This indicates a lack of business integrity and honesty and substantially increases the government's risk in dealing with them. Accordingly, Respondent's conviction for falsification is cause for debarment.

I am unpersuaded by Respondent's claim that she is innocent of the charge despite her guilty plea. The Judgment of the District Court clearly states that ". . . after an open court hearing, [this court finds] that the financial loss to the government as a result of the admitted criminal act of the defendant herein, has been determined to be \$30,340 said amount defendant does not dispute." (emphasis added).

There is no merit to Respondent's claim that she had no ". . . further obligation as a result of her employment contract than to sell the real estate." While it is true that she had no obligation to finance the purchasers' loans, it is also manifest that she had an obligation under the laws of Ohio to reveal any falsification by the purchasers which she became aware of after the sale. See, Case v. Business Centers, Inc., 357 N.E.2d 47, 49 (Ohio App. 1976). There is a clear fiduciary duty which is a condition to maintaining a broker's license in Ohio. Clark v. Hartley, 454 N.E.2d 1322, 1329 (Ohio App. 1982); McGarry v. McGrone, 118 N.E.2d 195, 198 (Ohio App. 1954). That fiduciary duty is no less when the transaction involves the Federal Housing Authority loan insurance program.

In their initial answer, Respondents raised res judicata as an affirmative defense, although they did not argue that issue in their brief. The thrust of the defense is that the ". . . three cases referred to in the Government's Complaint were examined at a hearing for the temporary denial of participation of Ava Realty on December 12, 1986. . ." After an informal hearing at the HUD Cleveland Office, the TDP was withdrawn on December 31, 1986. Res Judicata may apply in administrative proceedings if certain conditions exist. There must be an identity of parties and issues, a decision on the merits and a subsequent proceeding with the substantial attributes of an adjudicatory process. See generally, 4 Davis, Administrative Law Treatise, Ch. 21 (2d ed. 1983). Here, those conditions have not been met. Since neither the letter proposing the TDP, nor any other evidence of that proposal is of record, it is impossible to conclude that the issue or issues involved in the TDP are identical to those in the debarment actions. The debarment actions were taken approximately one year after the TDP was withdrawn; and from the mere withdrawal of the TDP without an explicit statement of the reasons for the withdrawal, one cannot conclude that the decision was based on the merits of any evidence, rather than on an intention not to interfere with any contemplated criminal referral. Moreover,

the issues involved in this proceeding are perforce distinct from any which may have been involved in the TDP proceeding, although there may have been certain common facts alleged in all of them, because the debarment is based on actions, the Information and subsequent conviction on a guilty plea, that occurred after the TDP.

In mitigation, Respondent reasserts her innocence and lack of knowledge of the commission of any fraud. However, her conviction was for ". . . knowingly and willfully, and with intent to defraud," causing false statements to be made to HUD. That conviction may not be collaterally attacked in this proceeding. The bare allegation of counsel, that Respondent is the sole support of her husband, and that her real estate business is exclusively FHA loans, is not proof of her financial posture, nor is it relevant to the issue whether her continued participation in HUD programs is consistent with the public interest. That argument is, in essence, that she has already been sufficiently punished. Debarment is not punitive; it is remedial, and is necessary to protect the Government from those who are not responsible and to deter those who might contemplate irresponsible conduct. Where, as here, the conduct involves moral turpitude, a three year period of debarment is warranted.

Conclusion and Order

Upon consideration of the public interest and the entire record in this matter, I conclude and determine that good cause exists to debar Edythe (Ava) Kupchick and Ava Realty, Inc. for a period of three years from June 16, 1988, the date of her suspension.

Alan W. Heifetz
Chief Administrative Law Judge

Dated: February 2, 1989

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ALAN W. HEIFETZ, Chief Administrative Law Judge, HUDALJ 88-1277-DB, were sent to the following parties on this 2nd day of February, 1989, in the manner indicated:

Chief Docket Clerk

CERTIFIED MAIL:

Leo C. DiEgidio, Esquire
The Pavillion, Box One
9735 Valleyview Road
Macedonia, OH 44056

INTER OFFICE MESSENGER:

Ronnie Ann Wainwright, Esquire
U.S. Department of Housing
and Urban Development
451 7th Street, S.W., #10266
Washington, D.C. 20410

Dawn Smith - Docket Clerk
for Debarments and Suspensions (02)
U.S. Department of Housing
and Urban Development
451 7th Street, S.W., #10266
Washington, D.C. 20410

Bruce J. Weichmann, Acting Director
Participation and Compliance Division
U.S. Department of Housing
and Urban Development
451 7th Street, S.W., #6284
Washington, D.C. 20410

REGULAR MAIL:

Edythe (Ava) Kupchick
Ava Realty
25230 Glenbrook
Cleveland, OH 44117